IN THE COURT OF APPEALS OF IOWA

FILED
FEB 23 1989
CLERK SUPREME COURT

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STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DWIGHT ANDREW MILLER,) 8-457 / 87-151
Defendant-Appellant.)

Appeal from the Iowa District Court for Boone County (7701), Carl E. Peterson and M.D. Seiser, Judges.

Defendant appeals his conviction, following a jury trial, for the crime of solicitation to commit a felony. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender; James R. Huff, Assistant Appellate Defender; and Dwight A. Miller, pro se, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

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SCHLEGEL, P.J.

This is an appeal by defendant Dwight A. Miller of judgment and sentence entered following a jury verdict finding him guilty of the offense of solicitation to commit a felony in violation of Iowa Code section 705.1 (1985). On appeal, Miller contends that the district court erred in admitting into evidence (1) certain evidence he owned that police officers received from a co-worker, and (2) tape-recorded conversations. Defendant also challenges several jury instructions, contends that he was denied his right to a speedy trial, and contends his trial counsel rendered ineffective assistance. We affirm defendant's conviction.

Dwight Miller, a Missouri resident, was upset with his former wife, who lived in Boone, Iowa. Among other things, Miller believed that his former wife and her parents were denying him visitation with the couple's children. Apparently he also had other complaints about the custody and support of the children.

Miller and a friend, Claussen, allegedly concocted a plan to break into the home of his former wife and her parents and hold the three hostage until they agreed to give Miller custody of the children, or at least to give him greater visitation rights and a lower support obligation.

Miller characterizes his conversations with Claussen as mere flights of fancy which he had no intention of carrying out. However, Claussen became concerned and informed police of Miller's statements. Police then recorded two subsequent conversations between Claussen and Miller.

Miller was later charged with the crime of soliciting Claussen to commit the felonies of kidnapping and burglary. A jury found Miller guilty of the crime charged, solicitation to commit a felony. Miller has appealed from the resulting conviction.

I. Miller first contends that the district court erred by admitting several items into evidence which included a shotgun (found inside a gun case), a duffel bag, and the following items found inside the duffel bag: a .357 magnum handgun, ammunition, and earplugs. All of these items were obtained by police from the Missouri home of Gary Walker, one of Miller's co-workers. Apparently Miller called Walker from Iowa, stated that he had been arrested for some "unpaid bills," and asked Walker to "pick up some things" from Miller's apartment, presumably to protect his property from bill collectors. Miller did not name any specific property for Walker to take. Walker went over to Miller's apartment, picked up the items in question (among other items), and took them back to his own home. When law officers arrived at his home a few days later and questioned him, he gave the officers information concerning

his conversation with Miller and voluntarily turned Miller's property over to them.

Miller moved to suppress that property on the ground that Walker lacked the authority to consent to its seizure. He claimed that its admission at trial would be violative of his fourth amendment rights. The district court overruled his motion to suppress and admitted the items into evidence at trial.

As the defendant correctly asserts, a search and seizure without a valid warrant is per se unreasonable and a violation of the fourth amendment unless it comes within a recognized exception to constitutional warrant requirements, such as consent, search incident to arrest, probable cause and exigent circumstances, or plain view. State v. Eubanks, 355 N.W.2d 57, 58-59 (Iowa 1984). In the absence of a warrant, the burden is on the State to show that a search or seizure was conducted under a valid exception to the warrant requirement. Id. at 59. In the case at bar, it is undisputed that the officers did not possess a search warrant for Walker's apartment. It is also undisputed that Walker freely and voluntarily gave his consent to the officers to seize Miller's property. The issue we are called upon to decide here is whether Walker, as a bailee of Miller's property, had the authority to consent in the first instance.

> Originally couched in terms of a distinct personal right of the subject of the search which could be waived only directly or through an

> agent, the consent exception as applied to third party consents has recently been focused on the third party. His legal and possessory rights to the premises or items searched, his relationship to the subject of the search and the circumstances as they objectively appear to the police at the time of the search are all to be considered in determining whether the third party possessed an independent right to consent to a warrantless search by the police which will operate to foreclose subsequent attempts at suppression by the subject of the search. [Citations omitted.] The rationale underlying this approach was stated in Frazier v. Cupp, 394 U.S. 731, 740, 89 S.Ct. 1420, 22 L. Ed. 2d 684 (1969), where the defendant and another both used a duffel bag and the defendant claimed no consent other than his own could be effective in regard to his portion of the bag. "Petitioner in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside it." [Emphasis added.]

United States v. Martinez, 450 F.2d 864, 866-67 (8th Cir. 1971). In making the assumption-of-risk analysis, the courts have often considered the extent to which the bailor made efforts to secure, even as against the bailee, the privacy of his effects. 3 W. LaFave & A. Scott, Search and Seizure § 8.6(a), at 312-13 (1987). As the United States Supreme Court stated in Katz v. United States, 389 U.S. 347, 351-52, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967):

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected. (Emphasis added.)

Our supreme court, citing State v. Flynn, 360 N.W.2d 762, 764-65 (Iowa 1985), further noted that:

> The Fourth Amendment protects only against the government's intrusion upon a person's legitimate expectation of privacy. The correct test of legitimacy is not whether the individual has chosen to conceal some private activity but whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.

State v. Showalter, 427 N.W.2d 166, 169-70 (Iowa 1988) (citations omitted).

In the case at bar the district court found that Miller had given Walker some control over the property in question, and we agree with this finding. The record indicates that Walker possessed a key to Miller's apartment, and at Miller's request, he removed some unspecified items from defendant's apartment and stored them in his home. The court also found that Miller had assumed the risk that Walker would permit someone else to see or take possession of these items. We also agree with this finding, as Miller did nothing to retain a reasonable expectation of privacy in the items seized. The record is devoid of any evidence that Miller made any attempt to preserve his privacy in these items, either by placing locks on them, or instructing Walker to forbid others access to them. It is our conclusion that any claimed expectation of privacy Miller may have is not one which society recognizes as objectively reasonable and legitimate, under the facts of this case.

The trial court did not err in overruling the motion to suppress and admitting the property in question into evidence at trial.

II. At trial, prosecutors introduced into evidence the tape recordings made of the conversations between Claussen and Miller on August 21, 1986, and August 23, 1986. Miller moved in limine to prevent the playing of the tapes before the jury, but the court overruled the motion. The court admitted these conversations as probative of what the defendant's statements and intent were on August 3, 1986. They were not admitted to show solicitations in the conversations themselves.

Miller contends that the court erred in admitting these tape recorded conversations between himself and Claussen. He argues that any probative value the tapes may have is outweighed by their prejudicial effect citing Iowa Rule of Evidence 403, and asserts that the tapes contain little that is directly relevant to his alleged solicitation of Claussen. He claims that since the statements contain many vulgar and obscene comments, these statements could not help but create a strong emotional reaction in the jury, which would likely lead it to reach a verdict based upon emotion rather than the evidence.

Our review of the transcripts of the tapes convinces us that they contain highly probative evidence of Miller's intent to solicit Claussen. Although the contents are

certainly prejudicial to Miller, "relevant evidence may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice." State v. Holland, 389 N.W.2d 375, 382 (Iowa 1986) (citing State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979)). The district court must balance the probative value against the prejudicial effect, and the court's decision will be reversed only upon a showing that the court abused its discretion. State v. Scott, 405 N.W.2d 829, 833 (Iowa 1987). We believe that the probative value of this evidence substantially outweighed the danger of unfair prejudice and we find no abuse of the trial court's discretion.

III. Defendant, in his supplemental pro se brief, raises additional claims of error. He claims: 1) the court committed reversible error in allowing the clerk of court's son to sit on the jury and that counsel was ineffective for failing to object; 2) the court committed reversible error in submitting several jury instructions; and 3) the court erred in overruling defendant's motion to dismiss on speedy trial grounds. We have considered the record and we find these arguments to be without merit.

We hereby affirm the defendant's conviction of solicitation to commit burglary and kidnapping in violation of Iowa Code section 705.1 (1985).

AFFIRMED.